BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

*** * * * ***

DELTA-MONTROSE ELECTRIC ASSOCIATION,	)	
	)	
COMPLAINANT,	)	
	)	
V.	)	**PROCEEDING NO. 18F-0866E**
	)	
TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,	)	
	)	
RESPONDENT.	)	

RESPONSE OF AMICI CURIAE UNITED POWER, INC. AND LA PLATA ELECTRIC ASSOCIATION, INC. TO TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION'S MOTION TO DISMISS

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INTEREST OF THE AMICI

United Power, Inc. ("United Power") is among the largest not-for-profit rural electric cooperatives in the Rocky Mountain region and, by substantial margin, the largest of the 43 member systems that comprise Tri-State Generation and Transmission Association, Inc. ("Tri-State"). Founded in 1938, United Power today has more than 90,000 active meters serving more than 250,000 Coloradans throughout the state's northern Front Range. La Plata Electric Association ("LPEA"), also a not-for-profit rural electric cooperative, is Tri-State's 3rd largest member and has nearly 44,000 active meters serving customers in La Plata, Archuleta, and portions of surrounding counties. Both United Power and LPEA (together "Amici") have been members of Tri-State for decades.

United Power and LPEA serve different parts of Colorado and operate on different scales, but they share a potentially existential interest in Tri-State's dispute with Delta-Montrose Electric Association ("DMEA")—and, in particular, Tri-State's effort to escape the jurisdiction of the Colorado Public Utilities Commission (the "Commission"). This is because Amici are deeply concerned that, if they someday find themselves in the same position as DMEA, Tri-State will hold hundreds of thousands of Amici's rural Colorado members hostage through unreasonable exit charges.

For example, if DMEA's exit charge is as outsized as DMEA asserts, the charge Tri-State might impose on United Power—whose purchases from Tri-State are *five times* those of DMEA—would be outright astronomical. LPEA, too, lacks the resources to satisfy an unreasonable exit charge. This is why Amici seek the security of knowing that this Commission will thoughtfully evaluate any exit charges, ensuring that they are just, reasonable, and nondiscriminatory.

INTRODUCTION

The Constitution of the State of Colorado grants this Commission "*all power* to regulate . . . facilities, service and rates and charges."[1] Applying this authority, the Colorado General Assembly has charged this Commission with the responsibility "to govern and regulate *all* rates, charges, and tariffs" and "to generally supervise and regulate *every* public utility in this state."[2] And the broad jurisdictional grant makes perfect sense; as the Colorado Supreme Court has recognized repeatedly, the Commission has specialized expertise—an expertise reflected by the broad deference that Colorado courts give to the Commission's conclusions.

Tri-State, a public utility, now claims that it can unilaterally impose massive exit charges that are impervious to the Commission's review. Were this true, the Commission's power would be an illusion. And hundreds of thousands of rural Coloradans, including Amici's customers, would face a cruel dilemma: either to spend decades trapped in Tri-State's regime (even if this meant absorbing utility rates far above market), or somehow find a way to pay hundreds of millions of dollars—or billions in the case of United Power—in unjust and discriminatory exit charges.

But it can't be true, and it isn't true. When the drafters of the Colorado Constitution gave this Commission "all power to regulate . . . charges," they meant what they said. Decades of legislation, numerous decisions from the Colorado courts, and this Commission's own rulings all say the same thing. Nothing in Tri-State's forty-six pages of contrived legal argument casts doubt on widely accepted, common-sense interpretation.

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[1] Colo. Const., Article XXV (emphasis added).

[2] C.R.S. § 40-3-102 (emphasis added).

In ruling on Tri-State's Motion to Dismiss, the Commission will set precedent with a profound long-term impact on not-for-profit utilities such as Amici. The Commission exists as a bulwark against discriminatory charges and practices. And if the Commission accepts Tri-State's cynical position, Amici, their members, and other similarly situated cooperatives, will likely find themselves at the mercy of public utilities like Tri-State for decades. This would upend years of legal precedent regarding the Commission's authority and have a drastic impact on Amici's members—the very people that the Commission exists to protect. For these reasons, Amici ask the Commission to deny Tri-State's motion to dismiss, and exercise its authority to determine when Tri-State's exit charges are unjust, unreasonable, and discriminatory.

DISCUSSION

As complicated as Tri-State makes it seem, the Commission's power to review Tri-State's exit charges hinges on two simple questions: (1) whether Tri-State's exit charges fall within the Commission's broad authority, and (2) whether Tri-State can avoid that authority by recasting DMEA's Formal Complaint, filed under C.R.S. §§ 40-3-106 and 40-3-111, as one for "breach of contract." To resolve these questions, the Commission need look no further than the plain language of the laws governing the Commission, and a handful of decisions that reinforce those laws. By contrast, Tri-State's efforts to establish otherwise are either transparent contrivances or strained interpretations that the Commission has already rejected.

I. AN EXIT CHARGE IS A CHARGE, AND THUS FALLS WITHIN THE COMMISSION'S PURVIEW.

More than six years ago, the Commission determined that Tri-State is a public utility subject to Articles 1-7 of Title 40 and the Commission's jurisdiction to hear formal complaints alleging discriminatory rates, charges, rules, or regulations.[3] Tri-State knows this, and already conceded as much in a prior proceeding.[4] Nonetheless, Tri-State again challenges the Commission's jurisdiction. Tri-State's core argument is that DMEA's Formal Complaint, alleging causes of action for an "unjust and unreasonable exit charge" and "discriminatory exit charge," does not identify an actual "charge" within the Commission's jurisdiction.

[3] Decision No. C14-0006-I, ¶ 44, Proceeding No. 13F-0145E (mailed Jan. 3, 2013).

[4] *See* Complaint, Attachment F (filed Dec. 6, 2018), Decision No. C14-0006-I, ¶¶ 24, 50, Proceeding No. 13F-0145E (mailed Jan. 3, 2014) (citing *Chimney Rock Pub. Power Dist. v. Tri-State Generation & Transmission Ass'n, Inc.*, Civ. Action No. 10-cv-03249-WJM-KMT, 2012 WL 84572 at *5, 2012 U.S. Dist. LEXIS 3402 at *14 (D. Colo. Jan. 11, 2012)).

Amici respectfully submit that an "exit charge" is, in fact, a "charge" within the Commission's jurisdiction. As the Colorado Supreme Court explained, the Commission "has broad constitutional . . . authority to regulate public utilities in Colorado."[5] And both the Colorado Constitution and the Public Utility Law leave no doubt that charges imposed by public utilities fall with the Commission's jurisdiction. To name a few examples:

- Article XXV of the Colorado Constitution grants to the Commission "all power to regulate . . . facilities, service and rates and *charges*," (emphasis added).
- C.R.S. § 40-3-101(1) states that "[a]ll *charges* made, demanded, or received . . . shall be just and reasonable," (emphasis added).
- C.R.S. § 40-3-102 authorizes the Commission "to govern and regulate all rates, *charges*, and tariffs" and "to generally supervise and regulate every public utility in this state," (emphasis added).
- C.R.S. § 40-3-106(1)(a) prohibits public utilities from "mak[ing] or grant[ing] any preference or advantage to a corporation or person or subject[ing] any corporation or person to any prejudice or disadvantage," whether "as to rates, *charges*, service, or facilities, or in any other respect," (emphasis added).
- C.R.S. § 40-3-111(1) empowers the Commission to determine whether "rates, tolls, fares, rentals, *charges*, or classifications . . . for any service, product, or commodity, or in connection therewith . . . or contracts affecting such rates, fares, tolls, rentals, *charges*, or classifications are unjust, unreasonable, discriminatory, or preferential, or in any way violate any provision of law," (emphasis added).

These laws speak for themselves. The Commission can, and should, regulate exit charges, just as it can regulate other charges imposed by a public utility.

Given the complexities inherent in regulating public utilities, this regulatory structure benefits both the public and the judiciary. As the Colorado Supreme Court explained, "the State has provided [the Commission] with the proper engineers and other expert assistants to ascertain

[5] *Integrated Network Servs., Inc. v. Pub. Utilities Comm'n of State of Colo.*, 875 P.2d 1373, 1377 (Colo. 1994).

whatever facts might be necessary or important to justify a conclusion in any case . . . ."[6] Colorado state courts, by contrast, are ones of general jurisdiction, lacking the specialization and targeted resources to efficiently tackle these complex regulatory issues. It is precisely because of "the [C]ommission's special expertise in public utility regulation" that courts "give great deference to the [Commission] in its selection of an appropriate remedy" with respect to cases involving public utilities.[7] The issues presented in this case are no exception. Indeed, the Commission, with its special expertise, would seem to be the most qualified arbiter of what constitutes a just, reasonable and non-discriminatory exit charge that, by definition, should not benefit either the departing or the non-departing Tri-State members.

II. TRI-STATE CANNOT DEMONSTRATE THAT AN EXIT CHARGE IS NOT A "CHARGE."

Given this overwhelming authority, resolving the jurisdictional question requires nothing more than understanding the plain meaning of the word "charge."[8] Yet Tri-State attempts to avoid the obvious by claiming that the Colorado Supreme Court has limited the Commission to evaluating only charges that "pertain to the cost of services rendered."[9] But Tri-State focuses misleadingly on only a portion of the Colorado Supreme Court's holding. Read in its entirety, the Court explained that rates and charges "pertain[ing] to the cost of services rendered" are *among*

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[6] *Ohio and Colo. Smelting & Ref. Co. v. Public Util. Comm'n*, 187 P. 1082, 1086 (Colo. 1920).

[7] *Mountain States Tel. & Tel. Co. v. Pub. Utils. Comm'n.*, 763 P.2d 1020, 1030 (Colo. 1988).

[8] American Heritage Dictionary of the English Language: https://www.ahdictionary.com/word/search.html?q=charge (Accessed 2/4/2019).

[9] Mot. 26 ("'The PUC protects the right of consumers to pay a rate that accurately reflects the cost of service rendered, and has a general responsibility to protect the public interest regarding utility rates.'" (emphasis in the original) (quoting *Colorado Office of Consumer Council v. Pub. Serv. Co. of Colo.*, 877 P.2d 867, 872 (Colo. 1994))).

the subjects of the Commission's authority—an authority that extends to "a *general responsibility* to protect the public interest regarding utility rates."[10] This includes "do[ing] whatever [the Commission] deems necessary or convenient to accomplish the legislative functions delegated to it."[11]

Tri-State then tries to cast aside the numerous provisions identified above. Specifically, it contends that C.R.S. § 40-3-101 confines the Commission's jurisdiction to "rate[s], fare[s], product[s], or commodit[ies] *furnished or to be furnished or any service rendered or to be rendered* . . . ." According to Tri-State, its exit charges fall beyond the ambit of the statute because "[n]othing is being furnished or rendered" in return for the charges.[12]

This illogical attempt to constrain the Commission's authority cannot square with the Colorado Supreme Court's recognition of the Commission's "broad constitutional and legislative authority to regulate public utilities in Colorado."[13] What's more, it ignores that Tri-State's exit charges form an integral part of what its members agree to pay in exchange for utility services. The fact that the amount becomes due only when the member seeks to terminate those services does not somehow displace the Commission's broad authority.

To see why, consider how Tri-State's position would apply in another context. Imagine that a public utility demanded $100 million from any of its C&I customers who wanted to exit and begin to self-generate. If Tri-State were right, the Commission would be powerless to evaluate whether this charge was just or reasonable. The situation here is conceptually identical.

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[10] *Colorado Office of Consumer Council v. Pub. Serv. Co. of Colo.*, 877 P.2d 867, 872 (Colo. 1994) (emphasis added).

[11] *Mountain States Tel. & Tel. Co. v. Pub. Utilities Comm'n*, 576 P.2d 544, 547 (1978).

[12] Mot. 26–27 (emphasis added).

[13] *Integrated Network Servs., Inc. v. Pub. Utilities Comm'n of State of Colo.*, 875 P.2d 1373, 1377 (Colo. 1994).

The Commission should not adopt an interpretation of the Colorado Constitution and the Public Utilities Law that leads to such an absurd and unfair result.

III. TRI-STATE'S CONTRACTS AND BYLAWS ARE IRRELEVANT TO THE COMMISSION'S JURISDICTION.

In light of the absence of legal authority supporting its position, Tri-State next tries a different tact: it contends that DMEA's claims do not actually implicate the fairness of an exit charge, but instead concern a breach of contract. But DMEA does not ask the Commission to interpret Tri-State's contracts with itself or other members. Nor does DMEA ask the Commission to construe Tri-State's Bylaws. And Tri-State doesn't have the right to demand the Commission do so.

If a public utility could remove itself from the Commission's oversight by imposing contractual provisions on its members or customers, the less scrupulous among them surely would not hesitate to do so. But such provisions run afoul of the fundamental rule that "[p]arties cannot by private contract abrogate statutory requirements or conditions affecting the public policy of [Colorado]."[14] In other words, Tri-State's exit charges can fall within the Commission's purview, regardless of their validity as a matter of contract or Tri-State Bylaws. The two are not mutually exclusive.

Tri-State's specific arguments on this point do not change the general result. For example, it claims that its Bylaws do not "give DMEA," (or, presumably, Amici), "the right to withdraw" at all[15] As a founding member of Tri-State, United Power finds this contention completely at odds with the cooperative business model as well as with Tri-State's prior

[14] *Peterman v. State Farm Mutual Auto. Ins. Co.*, 961 P.2d 487, 492 (Colo. 1998); *University of Denver v. Industrial Comm'n of Colorado*, 335 P.2d 292, 294 (Colo. 1959).

[15] Mot. 18.

applications of those very Bylaws. And both United Power and LPEA believe the argument is wrong as a matter of contract law. But there is no need for the Commission to dwell on Tri-State's hypothetical assertion, because it is entirely beside the point. In reality, Tri-State *hasn't* refused DMEA the right to exit the cooperative. What it *has* done is prescribe a specific exit charge—one that DMEA characterizes as "punitive," "dramatically high," "unreasonable," and "vastly disproportionate."[16] It is this exit charge that DMEA asks the Commission to review. There is nothing contractual about this request.

IV. THE COMMISSION REJECTED PREVIOUSLY TRI-STATE'S STANDING, COMMERCE CLAUSE, AND CONTRACT CLAUSE ARGUMENTS.

With its primary position untenable, Tri-State throws out a smattering of other arguments. First, it rehashes its contention that the Public Utilities Law does not apply to it. Second, it claims that DMEA's complaint was not signed by twenty-five customers as required by C.R.S. § 40-6-108(1)(b). Tri-State, however, already raised, and already lost, both of these arguments in Proceeding No. 13F-0145E. Tri-State does not even mention this prior result, let alone attempt to explain why a different result is appropriate here.

Third, Tri-State claims that the Commission cannot exercise jurisdiction on account of the Commerce Clause and Contract Clause of the United States Constitution. Again, Tri-State raised and lost nearly identical arguments in Proceeding No. 13F-0145E. As the Commission explained in that proceeding, Colorado has important interests in preventing unjust, unreasonable, discriminatory, and preferential rates and charges. Under binding precedent, these generalized protections do not conflict with the Commission's jurisdiction over Tri-State.[17]

[16] Formal Compl. ¶¶ 2, 12, 13, 15.

[17] Complaint, Attachment F, Decision No. C14-0006-I, ¶¶ 27, 31, 42–50, Proceeding No. 13F-0145E (mailed Jan. 3, 2014).

Colorado's interests here are no different. The Commission should again reject Tri-State's efforts to dodge its oversight.

Finally, unable to identify any reasoned basis for why the Commission cannot review its exit charges, Tri-State asserts that the Commission's powers are somehow restricted by how it "typical[ly]" or "generally" exercises them.[18] In other words, Tri-State suggests that the Commission cannot review an unreasonable exit charge because Tri-State is the first utility to try to impose such an outsized charge. Tri-State's self-serving characterizations of the Commission's past actions thus have no bearing on the actual scope of its authority. The novelty of an issue cannot render the Commission powerless to address it.

CONCLUSION

For the reasons explained above, Amici respectfully request that the Commission protect Amici and their members from unjust, unreasonable, and discriminatory exit charges by denying Tri-State's Motion to Dismiss and reviewing the exit charges on their merits.

[18] Mot. 27, 30-31.

DATED this 4th day of February, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2019, the foregoing document was served via electronic filing with the Commission and served on those parties shown on the Commission's Certificate of Service accompanying such filing:

s/ Michael L. O'Donnell
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